Filed 7/21/09 Scott v. Rayhrer CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JAY SCOTT,

Plaintiff and Appellant,

v.

CONSTANZE RAYHRER et al.,

Defendants and Respondents.

2d Civil No. B209160
(Super. Ct. No. CIV 241684)
(Ventura County)

Jay Scott appeals from a jury verdict in favor of respondents, Doctors Constanze Rayhrer and Gosta Iwasiuk, on his claim for medical malpractice. A drain inserted after surgery was left in his abdomen and not discovered and removed until 20 months later.

Scott contends that the trial court erred in denying his request for a res ipsa loquitur instruction as to Dr. Rayhrer, instructing the jury that a finding of res ipsa loquitur against Dr. Iwasiuk must be based on expert testimony, and refusing to instruct the jury that meeting the community standard of care does not excuse unreasonable conduct. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Scott had surgery for colorectal cancer in September 2002. Dr. Iwasiuk performed the surgery. Scott subsequently developed diarrhea and dehydration requiring

hospitalizations in January and February 2003. Scott's symptoms continued and, on August 1, 2003, a CT scan of Scott's abdomen revealed fluid collection in the sacral hollow near the rectum. A drainage catheter was placed to drain the fluid and removed a week later. On August 28, fluid collection was again seen on a CT scan. Scott continued to complain of pain related to reaccumulation of the fluid.

On September 9, 2003, while Dr. Iwasiuk was on vacation, Dr. Rayhrer placed two Penrose drains in the presacral space.[1] On September 18 and 19, Dr. Iwasiuk advanced the drains by pulling them partially out of the wound, trimming the protruding section, and securing them with safety pins to prevent them from being pulled back into the wound. Dr. Iwasiuk removed the drains on September 22.

After the drains were thought to be removed, fluid continued to accumulate. Scott experienced increased diarrhea, fever, and fatigue. Dr. Iwasiuk continued to treat Scott. On Dr. Iwasiuk's orders, a fistulogram was performed on May 3, 2005. The fistulogram showed a tubular structure resembling a drain. Dr. Iwasiuk performed surgery and removed a seven-inch Penrose drain or a portion of the drain.

Scott filed a complaint for medical malpractice against Doctors Iwasiuk and Rayhrer, Pueblo Radiology Group and Santa Paula Hospital. He settled with Pueblo and the hospital and proceeded to trial against the two doctors.

Scott requested that the jury be instructed on the doctrine of res ipsa loquitur in his claims against both doctors. The court refused to give the instruction as to Dr. Rayhrer and gave the instruction as to Dr. Iwasiuk only. Over Scott's objection, the court instructed the jury that a finding of negligence could be based only on expert testimony. Scott contends that there was no need for expert testimony because the basis of his claim is within the common knowledge of the jury. The trial court declined to give CACI No. 413 as requested by Scott that meeting the community standard of care does

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[1] A Penrose drain is a surgical rubber tubing placed in a wound to drain fluid. After it is surgically placed, it is cut to length, inserted in the wound, and then stitched to the skin at the exit point to prevent them from being pulled into the wound.

not excuse unreasonable conduct. The jury returned verdicts for the defendants. Scott's appeal is limited to these alleged instructional errors.

DISCUSSION

Standard of Review

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) A judgment may not be reversed on the basis of instructional error unless the error caused a miscarriage of justice. (*Id.* at pp. 573-574.) Reversal is not warranted unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. (*Id.* at p. 574.) "' . . . "A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. . . ." [Citation.]"' (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1157.)

"A judgment will not be reversed for error[] in jury instructions unless it appears reasonably probable that, absent the error, the jury would have rendered a verdict more favorable to the appellant. [Citation.]" (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 951.)

Res Ipsa Loquitur

"Res ipsa loquitur is a doctrine affecting the burden of producing evidence applicable to certain kinds of accidents that are so likely to have been caused by a defendant's negligence that, in the Latin equivalent, "'the thing speaks for itself.'" [Citation.] If applicable, the doctrine of res ipsa loquitur establishes a presumption of negligence requiring the defendant to come forward with evidence to disprove it. [Citations.]" (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1389.)

"Res ipsa loquitur is a rule of evidence allowing an inference of negligence from proven facts. [Citations.] It is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, [citations] permitting a common sense inference

of negligence from the happening of the accident. [Citations.] The rule thus assists plaintiffs in negligence cases in regard to the production of evidence. [¶] The applicability of the doctrine depends on whether it can be said the accident was probably the result of negligence by someone and defendant was probably the person who was responsible. [Citations.] In the absence of such probabilities, there is no basis for an inference of negligence serving to take the place of evidence of some specific negligent act or omission. [Citation.] [¶] A plaintiff must produce the following evidence in order to receive the benefit of the doctrine: 1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) it must have been caused by an agency or instrumentality within the exclusive control of the defendant; and 3) the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. [Citations.]" (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75-76.)

The Trial Court Did Not Err in Refusing to Give the Res Ipsa Loquitur Instruction as to Dr. Rayhrer

The trial court initially denied Scott's request to instruct the jury on res ipsa loquitur as to either doctor. As to Dr. Rayhrer, the court found that no evidence was presented that her conduct fell below the standard of care when she installed the drains. The court concluded the evidence showed that any error could only have occurred when the drain was removed by Dr. Iwasiuk and Dr. Rayhrer was no longer involved in Scott's treatment.

Scott contends the trial court erred in not applying the res ipsa loquitur instruction to Dr. Rayhrer because she could have negligently placed more or longer drains than Dr. Iwasiuk knew and thus be an independent tortfeasor. Scott relies on *Summers v. Tice* (1948) 33 Cal.2d 80, where two hunters fired shotguns, and pellets from one of the guns lodged in plaintiff's eye and lip, but it was not clear which gun injured plaintiff. The Supreme Court held: "If defendants are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived

of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. [Citation.]" (*Id.* at p. 88.)

Scott also relies on *Ybarra v. Spangard* (1944) 25 Cal.2d 486, a case relied on by the *Summers* court. In *Ybarra*, plaintiff was injured while he was unconscious during the course of surgery. He sought damages against several doctors and a nurse who attended him while he was unconscious. The court held that it would be unreasonable to require him to identify the particular defendant who had performed the alleged negligent act because he was unconscious at the time of the injury and the defendants exercised control over the instrumentalities which caused the harm. Therefore, under the doctrine of res ipsa loquitur, an inference of negligence arose that defendants were required to meet by explaining their conduct.

Those cases are not apposite because they involve injuries which occurred while two or more defendants were acting in concert. Here, two separate procedures were performed independently by two different doctors. There was no evidence that Scott's injury was caused by the insertion of the drains by Dr. Rayhrer. The injury resulted from the drain's presence long after Dr. Rayhrer had ceased treating Scott. All the evidence, including that presented by Scott's expert, was that the procedure used in inserting the drains conformed to a reasonable standard of care. Therefore, Scott did not carry his burden of presenting "'some substantial evidence which, if believed by the jury, would entitle it to draw an inference of negligence from the happening of the accident itself.' [Citation.]" (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 944.) The trial court did not err in refusing to instruct the jury as to res ipsa loquitur with respect to Dr. Rayhrer.

The Trial Court Did Not Err in Instructing the Jury that a Finding of Negligence Must be Based on Expert Testimony

The court gave the following instruction as to Dr. Iwasiuk: "Mr. Scott may prove that Dr. Iwasiuk's negligence caused his harm if he proves all of the following: One, that Mr. Scott's harm ordinarily would not have occurred unless someone was negligent. In deciding this issue, you must consider only the testimony of the expert

witnesses. Two, that the harm occurred while Mr. Scott was under the care and control of Dr. Iwasiuk. And, three, that Mr. Scott's voluntary actions did not cause or contribute to the events that harmed him."

As a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligence by the defendant caused the plaintiff's damages. (*Flowers v. Torrance Memorial Hosp. Med. Ctr.* (1994) 8 Cal.4th 992, 1001.) A narrow exception to this rule exists where "'". . . the conduct required by the particular circumstances is within the common knowledge of the layman." . . . [Citations.]'" (*Ibid.*) This exception is, however, a limited one. It arises when a foreign object such as a sponge or surgical instrument, is left in a patient following surgery and applies only when the plaintiff can invoke the doctrine of res ipsa loquitur. (*Ibid.*; *Blackwell v. Hurst, supra,* 46 Cal.App.4th at pp. 943-944; *Gannon v. Elliott* (1993) 19 Cal.App.4th 1, 6-7.) "The 'common knowledge' exception is generally limited to situations in which . . . a layperson ' . . . [can] say as a matter of common knowledge . . . that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.' [Fn. & citations omitted.]" (*Flowers*, *supra*, at p. 1001.)

As the trial court correctly ruled, the exception does not apply here because the method of removing Penrose drains is not within the common knowledge of laymen. (See *Miller v. Jacoby* (2001) 145 Wash.2d 65 [33 P.3d 68, 75] [method of removing Penrose drains not a matter of common knowledge and res ipsa loquitur does not apply].)

The Trial Court Did Not Err in Its Instruction

to the Jury on the Standard of Care

The plaintiff in a medical malpractice action must show by competent expert evidence that defendant's medical treatment fell below the community standard of care. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408-410.)

Scott requested the court give CACI No. 413 which states: "You may consider customs or practices in the community in deciding whether defendant acted

reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in defendant's situation. They are only factors for you to consider. [¶] Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable." The court did not give this instruction when it explained the standard of care to the jury.

Instead, the court instructed the jury with CACI No. 502, the standard jury instruction as to the standard of care for medical specialists, as follows: "A general surgeon is negligent if he or she fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful general surgeons would use in similar circumstances. This level of skill, knowledge and care is sometimes referred to as the 'standard of care.' You must determine the level of skill, knowledge and care that other reasonably careful general surgeons would use in similar circumstances based only on the testimony of the expert witnesses, including Dr. Iwasiuk and Dr. Rayhrer, who have testified in this case."

The court then instructed the jury with CACI No. 505 which states: "A general surgeon is not necessarily negligent just because his or her efforts are unsuccessful or he or she makes an error that was reasonable under the circumstances. A general surgeon is negligent only if he or she was not as skillful, knowledgeable, or careful as other reasonable general surgeons would have been in similar circumstances."

Scott argues that the failure of the court to give CACI No. 413 was prejudicial error because, in the absence of the instruction, the jury was left with the impression that conforming to a customary practice insulated defendants from liability arising from that practice. This argument is contrary to the well-established principle that the law """demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he [or she] exercise ordinary care in applying such learning and skill to the treatment of the patient." [Citation.]' [Citation.]" (*Flowers v. Torrance Com. Hosp., supra,* 8 Cal.4th at p. 998.) CACI No. 413 applies only where the standard of care is within common knowledge. (*Leonard v. Watsonville Com. Hosp.* (1956) 47 Cal.2d 509, 519.)

The instruction is not appropriate where, as here, the standard of care must be established by expert testimony. (See *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 276-277 [where expert testimony is needed to show negligence, that testimony establishes the standard of care].)

The judgment is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Barbara Lane, Judge

Superior Court County of Ventura

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